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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/877,757	06/08/2001	Elizabeth Varriano-Marston	MARS93-DIV	3933

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EXAMINER	
PATTERSON, MARC A	

ART UNIT	PAPER NUMBER
1772	13

DATE MAILED: 07/30/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action	Application No.	Applicant(s)	
	09/877,757	VARRIANO-MARSTON, ELIZABETH	
	Examiner	Art Unit	
	Marc A Patterson	1772	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 July 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

a) ☐ The period for reply expires _____months from the mailing date of the final rejection.

b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.

2. ☒ The proposed amendment(s) will not be entered because:

   (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);

   (b) ☐ they raise the issue of new matter (see Note below);

   (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or

   (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.

4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

5. ☐ The a)☐ affidavit, b)☐ exhibit, or c)☐ request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.

6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

7. ☒ For purposes of Appeal, the proposed amendment(s) a)☒ will not be entered or b)☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

   The status of the claim(s) is (or will be) as follows:

   Claim(s) allowed: *none*.

   Claim(s) objected to: *none*.

   Claim(s) rejected: *1-14,21 and 22*.

   Claim(s) withdrawn from consideration: *none*.

8. ☐ The proposed drawing correction filed on _____ is a)☐ approved or b)☐ disapproved by the Examiner.

9. ☐ Note the attached Information Disclosure Statement(s)(PTO-1449) Paper No(s). _____.

10. ☒ Other: *See attached.*

ADVISORY ACTION

Applicant's arguments filed July 9, 2003 have been fully considered but have not been found to be persuasive.

1. Applicant argues, on page 6 of Paper No. 12, that the rejection is improper because the claimed invention is directed to films having an optimal size shape and number of the set of microperforations. However, the claims prior to amendment did not contain the limitation 'based on a number and a size of said microperforations.' The amendment therefore raises a new issue, which to be fully addressed would require further search and consideration, and the amendment therefore has not been entered. Even if the amendment was entered, the amended claim would not overcome the rejection because the phrase is indefinite as its meaning is unclear; the phrase 'based on' is unclear, and it is also unclear what 'size' and 'number' are being claimed.

Applicant also argues on page 6 that it was improper to make the previous Action final because the amendments in Paper No. 12 directed to 'drill holes' and the use of a 'non – porous' material were clarifications of 'microperforations.' However, the amendments clearly change the scope of the claims, as the claims prior to amendment were not directed to holes which are drilled or to the use of a material which is microperforated and which contains no pores. The amendment also clearly overcomes the previous prior art consisting of De Moor, Kurachiand and Clark, as the combination of these references discloses a film which is arguably microperforated, but which is also porous and does not contain drill holes.

Applicant also argues on page 6 that amended Claims 10 – 11 overcome the 35 U.S.C. 112 second paragraph rejections of the previous Action. However, the claims prior to amendment were not directed to a bag which is 'substantially enclosed' or 'with an open edge,

side edges and an opposing bottom edge.' The amendment therefore raises a new issue, which to be fully addressed would require further search and consideration, and the amendment therefore has not been entered.

Applicant also argues on page 9 that the microperforations of the claimed invention are not just a bunch of holes poked into a container as in Kocher but rather the size, shape, aspect ratio and number of microperforations control the atmospheric conditions. However, as stated above, the claims prior to amendment did not contain the limitation 'based on a number and a size of said microperforations.' The amendment therefore raises a new issue, which to be fully addressed would require further search and consideration, and the amendment therefore has not been entered.

Applicant also argues on page 11 that Kocher fails to define what oxygen and carbon dioxide levels are established in the container. However, no specific oxygen or carbon dioxide levels for the container are claimed, although transmission rates and fluxes for the packaging material are claimed.

Applicant also argues on page 11 that the reference in the previous Action to 'oxygen flux' actually refers to oxygen transmission rate and not flux. However, as stated by Applicant on page 5 of Paper No. 7, flux is the product of oxygen transmission rate and surface area of the film; therefore, as stated on page 2 of the previous Action, it would be obvious for one of ordinary skill in the art to vary the oxygen flux, as it would be obvious for one skilled in the art to vary the oxygen transmission rate

Applicant also argues on page 11 that there is no description in Kocher of employing a certain number/shape/size of microperforations to control atmospheric conditions with the

package; the perforations are large enough to permit the passage of atmospheric gas therethrough, Applicant argues, but small enough to prevent the passage of liquids or dirt. However, as stated above, the claims prior to amendment did not contain the limitation 'based on a number and a size of said microperforations.' The amendment therefore raises a new issue, which to be fully addressed would require further search and consideration, and the amendment therefore has not been entered. Furthermore, Kocher does control atmospheric conditions, as the presence of the microperforations increases the gas content of the package from vacuum conditions to atmospheric conditions (column 18, lines 35 – 63); the prevention of dirt and liquids from entering the package also prevents contaminants from entering the atmosphere, thus controlling the content of the atmosphere.

Applicant also argues on page 12 that the perforations of Kocher are throughout the lid and not in a registered target area to prevent occlusion. However, a target area to prevent occlusion is not claimed. Furthermore, the microperforations disclosed by Kocher are made by sharp objects (column 18, lines 6 – 12); the surface of the lid of Kocher therefore constitutes a registered target area, as it is a target area for the sharp objects, in which the microperforations are made, or registered.

Applicant also argues on page 12 that the term microperforation is not in Kocher. However, Kocher clearly discloses perforations having a diameter of 5 microns (column 17, lines 66 – 67), thus Kocher discloses microperforations.

Applicant also argues on page 15 that it would not be obvious for one of ordinary skill in the art to optimize the oxygen flux rate and carbon dioxide flux rate in Kocher, because Kocher does not disclose control of the atmosphere. However, as stated above, Kocher does control

atmospheric conditions, as the presence of the microperforations increases the gas content of the package from vacuum conditions to atmospheric conditions (column 18, lines 35 – 63); the prevention of dirt and liquids from entering the package also prevents contaminants from entering the atmosphere, thus controlling the content of the atmosphere.

Applicant also argues on page 15 that routine optimization is not supported by the overall function of Kocher, as Kocher is seeking to let air into a container, not to establish certain atmospheric conditions according to established oxygen and carbon dioxide concentrations. However, as stated above, to let air into a container, from vacuum conditions, is also to establish certain atmospheric conditions according to established oxygen and carbon dioxide concentrations.

Applicant also argues, on page 16, that Porchia states that it is a packaging bag with microholes throughout that is 'independent of product, shape, amount and transpiration,' and therefore admits that it is not intended for controlling atmospheric conditions. However, as stated on page 2 of the previous Action, Porchia et al teach the use of microperforated packaging in a bag (column 2, lines 50 – 60) for the purpose of controlling the weight loss of fruit stored in the bag (column 2, lines 50 – 60). The desirability of providing for a bag in Kocher et al, which comprises microperforated packaging, would therefore be obvious to one of ordinary skill in the art.

It therefore would have been obvious for one of ordinary skill in the art at the time Applicant's invention was made to have provided for a bag in Kocher et al in order to control the weight loss of fruit as taught by Porchia et al.

Conclusion

2. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Patterson, whose telephone number is (703) 305-3537. The examiner can normally be reached on Monday through Friday from 8:30 AM to 5:00 PM. If attempts to reach the examiner by phone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached at (703) 308-4251. FAX communications should be sent to (703) 872-9310. FAXs received after 4 P.M. will not be processed until the following business day.

Marc A. Patterson, PhD.
Marc Patterson
Art Unit 1772

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